IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

BERNARD SCHEFE,
Plaintiff in Error,
vs.
THE CITY OF ST. LOUIS.
No. 62.

In Error to the Supreme Court of the State of Missouri.
(18,573)

STATEMENT.

This case arose in the police court of the city of St. Louis upon the following facts:

Plaintiff in error for some years prior to May, 1898, had been a resident of St. Louis, engaged in business as a dairyman, maintaining and operating a dairy in said city.

On May 5, 1898, and prior thereto, he was the owner of a piece of property known as number 3012 Osage street, in said city, and upon the property he

had a dwelling house and stable, but maintained his dairy elsewhere.

On May 5, 1898, he removed his cows and dairy from his former location, installed his cows in the stable upon the property described and began to conduct his business as a dairyman upon the premises.

At that time there was in force in the city of St. Louis a certain ordinance known as section 5 of ordinance No. 18,407, approved April 6, 1896, which provided:

> "No dairy or cow stable shall hereafter be erected, built or established within the limits of this city, without having first obtained permission so to do from the municipal assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on the premises unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred nor more than five hundred dollars."

Plaintiff in error had not obtained the permission to maintain and operate his dairy at the premises 3012 Osage street, as required by said ordinance, and on the 6th day of May, 1898, the city attorney of St. Louis instituted this cause in the police court by filing

against the plaintiff in error a complaint in the words and figures following:

> "May 6, 1898, B. Schefe to city of St. Louis Dr. $500, violation ordinance 18,407, section 5, approved April 6, 1896. On the 5th day of May, 1898, B. Schefe, being the owner and occupant of premises known as No. 3012 Osage street, St. Louis, Missouri, did then and there at said time and place and on said premises erect, build and establish a certain dairy and a certain cow stable without first having obtained permission so to do from the municipal assembly by proper ordinance.
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> "Second.—And the said B. Schefe, defendant herein, did then and there at the time and place aforesaid, and on the premises aforesaid, maintain a certain dairy and cow stable without permission so to do from the municipal assembly by proper ordinance."

In all the lower courts the cause was tried upon an agreed statement of facts which follows:

> "The plaintiff, the city of St. Louis, is a municipal corporation organized and existing under the laws of the state of Missouri, and defendant is owner and occupant of 3012 Osage street, St. Louis, Missouri, upon which was located on the 5th day of May, 1898, a dwelling and frame stable, which said stable had been erected and built prior to the ownership and occupancy of premises by defendant.

"Defendant, who was at the time a dairyman of several years' standing in the said city, did on or about the 5th of May, 1898, place in said stable a number of cows, and did proceed to conduct upon said premises a dairy, and produce and sell milk therefrom and was doing so at the time of commencement of action in First District Police Court. That defendant commenced the operation of said dairy establishment on or about the aforesaid date without having obtained permission to do so from the municipal assembly by ordinance, and defendant did maintain on said premises a dairy and stable without permission.

"Said dairy and stable was not in operation upon said premises at the time of the approval of ordinance 18,407, on April 6, 1898, said section 5 of said ordinance 18,407 being as follows:

" 'Section 5. No dairy or cow stable shall hereafter be erected, built or established within the limits of this city without having first obtained permission so to do from the municipal assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on the premises unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred nor more than five hundred dollars.'

"That no question of nuisance or no nuisance shall be considered in this case:

"It being hereby distinctly understood, agreed and stipulated that the issue and question submitted to the court for decision and determination is the validity or invalidation of the said section 5 of ordinance 18,407, and upon which judgment shall be had either by plaintiff or defendant, as the court may find. Section 5, ordinance 18,407, as set out herein, may be considered in evidence for the purpose of this case."

Plaintiff in error was adjudged guilty in the police court and fined one hundred dollars, appealed to the St. Louis Court of Criminal Correction where, upon a trial *de novo*, he was again convicted and the same fine imposed.

In the trial courts plaintiff in error moved to quash the information filed against him, and as grounds for his motions assigned, among others, the following specific reason:

"Because said section 5 is void, being in violation of the XIV Amendment to the Constitution of the United States in that 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'" (Abstract, pages 10, 13.)

The cause was appealed to the Supreme Court of the State of Missouri and there plaintiff in error

again urged among other reasons for a reversal of the judgment of the lower court that:

> "The ordinance violates the XIV Amendment to the Constitution of the United States:
>
> "Because it discriminates between persons of the same class and tends to create a monopoly,
>
> "Because it deprives persons of their property without due process of law,
>
> "Because it denies to persons within its jurisdiction the equal protection of the law,
>
> "Because it is not a valid police regulation, but tends to the destruction of a lawful business." (Abstract, page 17.)

The supreme court affirmed the judgment of the lower courts and decided:

That the city of St. Louis had the absolute power to prohibit the erection or maintainance of a dairy within its corporate limits (Abstract, page 20);

That the ordinance is a valid police regulation (Abstract, page 21);

That the ordinance does not violate the XIV Amendment to the Constitution of the United States (Abstract, page 21).

Plaintiff filed his motion for a rehearing of the cause, and urged that the Supreme Court of Missouri had overlooked the authorities cited to sustain the argument that the ordinance in question violated the XIV Amendment to the Constitution of the United States.

This motion was overruled, and the cause comes to this court by writ of error.

BRIEF.

I.

In a suit brought to this court from a state court, which involves the constitutionality of ordinances made by a municipal corporation, this court will, when necessary, put its own independent construction upon the ordinances.

Yick Wo vs. Hopkins, 118 U. S. 356, 366;
Minnesota vs. Barber, 136 U. S. 313.

II.

An ordinance which denies to a person the right to engage in a lawful business or occupation followed and engaged in by others, deprives such person of his property and liberty without due process of law, abridges his privileges and denies him the equal protection of the laws, contrary to the provisions of the XIV Amendment to the Constitution of the United States, and is void.

Yick Wo vs. Hopkins, 118 U. S. 356;
In re Hong Wah, 82 Fed. 623;
In re Tie Lay, 26 Fed. 611, 615;
Barthet vs. City of New Orleans, 24 Fed. 563, 566;
In re Quong Woo, 13 Fed. 229;
City of Newton vs. Belger, 143 Mass. 598;
Tugman vs. City of Chicago, 78 Ill. 405;
Mayor vs. Thorne, 7 Paige, 261;
St. Louis vs. Dorr, 145 Mo. 466.

III.

An ordinance which treats a lawful business and occupation, irrespective of location or the manner in which it is carried on, as a nuisance and tends to suppress such business, denies to the person or persons carrying on such business the equal protection of the law and tends to create a monopoly, and is void as conflicting with the XIV Amendment to the United States Constitution.

Yick Wo vs. Hopkins, 118 U. S. 356;
The Stockton Laundry Case, 26 Fed. Rep. 611–614;
State vs. Mahner, 43 La. Ann. 496;
Yates vs. Milwaukee, 10 Wall. 497.

IV.

Under the decision of the Supreme Court of the State of Missouri the scope, purpose and effect of this ordinance is to compel the dairymen of St. Louis to move their business outside the limits of the city whenever by circumstances they are compelled to leave the premises upon which their dairies and cow stables were in operation at the time the ordinance went into effect. Such an ordinance tends to destroy a lawful occupation and business and conflicts with the XIV Amendment to the United States Constitution.

Yick Wo vs. Hopkins, 118 U. S. 356;
The Stockton Laundry Case, 26 Fed. Rep. 611–614.

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V.

The police power of the state extends only to the regulation of the pursuits of man, so that they shall not become, in their mode of exercise, unhealthy, noisome, dangerous, or otherwise destructive or injurious to the common interests of the community.

In re Jacobs, 98 N. Y. 98;
Barthet vs. City of New Orleans, 24 Fed. 563;
In re Andrew Frazee, 63 Mich. 396;
Mayor vs. Radecke, 49 Md. 217;
State vs. Tenant, 110 N. C. 609;
City vs. Dudley, 129 Ind. 112;
Anderson vs. City, 40 Kan. 173.

ARGUMENT.

I.—The plain terms and language of the ordinance complained of preclude the idea of a proper and valid police regulation.

It undertakes to permit the maintenance in any and every part of the city of St. Louis, in densely populated neighborhoods as well as in the open territory near the city limits. Any one, irrespective of qualifications, can engage in the business as long as he is able to procure the consent of the municipal assembly. The question of who is to be a dairyman and where the dairy is to be located is in each particular case left to depend upon the mere will and caprice of a majority of the men constituting the municipal assembly. A dairy may be maintained in a crowded and densely built up neighborhood, and the right to maintain such dairy in a strip of territory especially adapted by its environments for the business may be refused, simply because the assembly see fit to so ordain.

The Supreme Court of Missouri very frankly say in their opinion (Abstract, pages 19, 20) that the city of St. Louis has the right to define limits within which no dairy shall be established, and to make these limits co-extensive with the limits of the city.

This decision makes the scope and purpose of the ordinance plain. If the municipal assembly will refuse permits for the establishment of new dairies, the

removal of old ones (as in this case) from a certain location to a more favorable one, the re-establishment of a dairy once abandoned, the erection of cow stables and dairy buildings on a piece of property in a sparsely settled district to which a dairyman is compelled to remove by reason that the district in which he has carried on his business is becoming densely populated and real estate too valuable for dairy purposes, then, by force of circumstances, the number of dairies within the corporate limits would gradually but steadily be reduced until all were gone. The city would, by slow process, accomplish that purpose with regard to her dairies which cities like San Francisco have for years sought to accomplish by similar legislation with regard to their laundries.

In one instance the process operates directly, in the other indirectly, but always to accomplish the same unlawful purpose—the suppression and destruction of a lawful and necessary business, and the oppression of a certain class of citizens in the use and enjoyment of their property.

There can be nothing to prevent the municipality from suppressing every dairy which may be adjudicated a nuisance by a court of competent jurisdiction, and as to the dairies now existing the natural presumption is that they are harmless.

The ordinance may be as prejudicial to the community at large as to the dairymen. Under its provisions even the most densely settled block in the

city might have to tolerate a cow stable at the pleasure of an irresponsible municipal assembly.

Nothing we can say on the subject could add to the plain language leveled against similar legislation by this court in the cases cited in our brief.

II.—In the present case the plaintiff in error was, at the time of the commission of the alleged offense, the owner of the property with reference to which the offense is alleged to have been committed.

He owned the real estate, equipped with buildings and stable, and had owned a dairy business in St. Louis for years. On May 5, 1898, he placed his cows in the stable of the property mentioned in the complaint, and began to operate his dairy business from those premises.

Why do these acts make him guilty of an offense? Because he did not procure "the permission of the municipal assembly so to do."

Similar attempts to curtail the use of property and the exercise of the right to choose and follow a harmless and lawful occupation upon equal terms with others by conferring upon "municipal authorities arbitrary power, at their own will, and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the places selected, for the carrying on of the business" have been repeatedly condemned

by this court, and in the case of Yick Wo vs. Hopkins, 118 U. S. at page 370, the court say:

> "The fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth may be a 'government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails as being the essence of slavery itself."

Respectfully submitted,

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